IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 518 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MARSINGHBHAI JOGADABHAI DAMOR & ANOTHER
Versus
THE STATE OF GUJARAT

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Appearance :
MR YM THAKKAR for Appellants.
MS DS PANDIT, ADDL. PUBLIC PROSECUTOR for Opponent.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 19/09/2007

ORAL JUDGMENT

1. Heard Mr. Y.M. Thakkar, learned advocate for the appellants and Ms. D.S. Pandit, learned Additional Public Prosecutor for the State.

2. The appellants are accused No.1 and 2 of Sessions Case No. 285 of 2004. [When the case of the accused persons were committed to the Court of Sessions, it was registered as Sessions Case No. 9 of 2004 of Panchmahals District wherein learned Additional sessions Judge, Fast Track Court No.4, Panchmahals at Godhra framed charges against the accused persons but on separation of judicial District, the Sessions Case was transferred to the Court of Sessions at Dahod District,and the case is re-numbered as Sessions Case No. 285 of 2004]. Learned Sessions Judge, Dahod tried all the three accused persons, and, at the conclusion of the trial, the learned Sessions Judge, Dahod acquitted accused No.3 Lalabhai Jogdabhai Damor. However, the learned trial Judge convicted accused No.1 for an offence punishable under section 304 Part II of Indian Penal Code and sentenced him to undergo rigorous imprisonment for 5 years and fine of Rs.1000/-, in default of payment of fine, simple imprisonment for one month. So far as accused No.2 is concerned, the learned trial Judge convicted him for an offence punishable under section 324 of the Indian Penal Code and sentenced him to

undergo simple imprisonment for two years and fine of Rs.500/-, in default of payment of fine, simple imprisonment for 15 days. Both the accused were also convicted under section 135(2) of the Bombay Police Act and both were sentenced for 3 months' simple imprisonment and fine of Rs.100/- each, in default of payment of fine, simple imprisonment for one week. The sentences were ordered to run concurrently in both the cases. The said order of conviction and sentence are challenged by the appellants in the present appeal.

3. Mr. Y.M. Thakkar, learned advocate for the appellants has taken me through the basic case of the prosecution and the evidence led during the course of trial. The order of conviction and sentence is assailed on various grounds mentioned in the memo of appeal and by reading relevant part of the judgment, Mr. Thakkar has argued that the findings recorded by the learned trial Judge is erroneous, as the same is based on conjectures and basic principles of appreciation of evidence were ignored while linking the accused with the crime. Undisputedly, the present accused as well as the complainants were on inimical terms and there was land dispute between them. The learned trial Judge was deciding a cross-case. If the evidence of ASI examined

by prosecution, PW.12, Exh. 41 [page No.255-257], this police witness has admitted that at the time of arrest, all the three accused were injured and when the police took the photographs, all the three had injuries on their head and had bandages applied by the Government Hospital. According to Mr. Thakkar, except a casual reference to the cross case, there is no discussion in the judgment as to the result or outcome of the cross case. Normally cross-cases should be tried and decided simultaneously otherwise it is likely to result into serious prejudice to the accused. According to Mr. Thakkar, the witnesses examined by the prosecution in the capacity of eye witness to the incident have given a contrary version to their initial say. It emerges from the evidence that prior to going to hospital with the injured Jhumbliben, they had been to the police station; police had given a yadi to them. The Doctor who initially examined injured Jhumliben was told that she had sustained injuries because of a pelted stone. It is also in the evidence that damages were also suffered to the house of Jhumliben and roof tiles were also broken because of pelting of stone towards the house. It is argued that when the Doctor declared Jhumliben dead as she succumbed to the injuries sustained, the family members, who were present in the hospital, concocted a story and branded all the

three persons as persons holding a 'kulhady' [axe], 'dharia' [scythe] and stick in their respective hands and of a group of assailants. The delay of four hours in lodging the FIR goes to the root of the merits of the case in the background of one important fact that they had been to police station initially and atleast one of them could have lodged a detailed FIR placing the case in detail. Prosecution witnesses examined have also explained the visible injuries on the body of the accused persons. The learned Sessions Judge has ignored one aspect that eye witness to the incident, perhaps, were the accused of the cross-case. Therefore, their status was of partisan witnesses. It is therefore submitted by Mr. Thakkar that when the prosecution has not placed one consistent story, then the advantage should go to the accused.

4. In the instant case, two parallel stories emerge from the evidence – one of pelting stones between two groups against each other and the other of an attack by the accused persons, attributing 'kulhadi' [axe], 'dharia' [scythe] and stick in the hands of the accused. It is, however, pertinent to note that all the three accused had head injuries and the prosecution was under a legal obligation to explain the injuries. True it is,

invisible injuries are not required to be explained by the prosecution but visible, bleeding injuries, and that too, head injuries to all the three accuses persons, should have been explained by the prosecution witnesses. This suppression uproots the substratum of the story placed by the prosecution.

5. In response to a query put by the Court, learned Additional Public Prosecutor, Ms. D.S. Pandit has drawn the attention of the Court to the charges framed. According to the prosecution, all the three accused were charged for offence punishable under section 302 read with section 114 for committing murder of Jhumliben. She has fairly admitted that there is no acquittal appeal qua the acquittal of accused No.3 recorded by the learned trial Judge. She has also fairly admitted that there is no appeal against the acquittal of the present appellants for an offence punishable under section 302, IPC. Accused No.2 was charged for causing injury by dharia' [scythe] to one Nanjibhai. According to the prosecution, Nanji was brother of the husband of deceased Jhumliben. According to the prosecution case, one Kanjibhai was also present at the scene of offence and he was also injured. According to learned APP, both Kanji and Nanji have not been examined as witnesses. Therefore, the injury

certificate qua the injuries suffered by Nanji produced by the prosecution during the cross-examination of the Doctor loses its significance. Neither the investigating officer nor the Doctor has produced the injury certificate of the accused persons or any one of them.

6. In paragraph 30 of the impugned judgment, the learned Sessions Judge has referred to the cross-case and has attempted to explain as to how the present Sessions Case is a different case and therefore being decided as a separate case against the accused persons. When it is clear that as per the complaint in the cross-case, time of the incident shown is same as mentioned in the compliant in the present case, there is no reference to the distance between the residential house of deceased Jhumbliben and the agricultural field referred to by the learned trial Judge. The learned trial Judge therefore arrived at a finding that there is enough probability to have a group conflict between the family of the deceased Jhumliben on one side and the accused on the other side. According to Mr. Thakkar, both the families were on inimical terms and had disputes over a property, i.e. agricultural land. The two groups started pelting stones towards each other; the accused persons, therefore, suffered injuries on their heads and were treated in the

Government Hospital; one of the stones pelted from the accused side might have hit on the forehead of the deceased, which was the fatal injury noticed by the Doctor at the time of performing autopsy. Obviously, there is no evidence as to who is the author of the blow which caused the fatal injury to the deceased. Considering the damages to the roof tiles of deceased Jhumliben, it is also possible that number of persons on both the sides must have pelted stones. The Doctor who treated Jhumliben initially has recorded that the injury was caused by a pelted stone. The history was so recorded by the Doctor because he was informed so by the injured and the persons who brought injured Jhumliben for treatment with a police yadi; otherwise there is no reason for the Doctor to record that the injury was caused in stone pelting, only with a view to save the accused.

7. That apart, the Doctor who conducted the autopsy has clearly stated in the cross examination that the fatal injury can be caused by stone pelting. This Doctor was also shown the muddamal axe and after taking the same in his hands and taking into consideration the blunt portion of the axe and the weight of the axe, he has stated that it may or may not be possible to cause the fatal injury

by the muddamal axe. Thus, the Doctor is definite in his version that the fatal injury is possible by stone but he is not sure whether the fatal injury is possible by the muddamal axe when he says that it may or may not be possible to cause the fatal injury by the muddamal axe. The totality of the circumstances was sufficient for the trial Judge to come to a conclusion that the prosecution has not satisfactorily proved the charges.

8. Having heard the learned advocate for the appellants and the learned Additional Public Prosecutor and on evaluation and appreciation of the evidence on record, this Court is of the view that the accused are required to be acquitted for the following reasons:

[1]. None of the two important witness referred to in the FIR, i.e. Nanji and Kanji, have been examined.

[2]. It has emerged that the deceased might have sustained the injuries on account of stone pelting.

[3]. It is not the case of the prosecution that one of the accused was responsible for causing the fatal injury while pelting stones.

[4]. There is delay in filing F.I.R.

[5]. At the initial stage, the basic story was not unfolded either before the police in spite of the fact that the prosecution witnesses, prior to coming to the hospital, went to the police station, or before the Doctor at the initial stage of treatment.

[6]. The history given to the Doctor is not in conformity with the sub-stratum of the story of assault by axe and scythe.

[7]. The fact of cross case has not been correctly appreciated by the learned trial Judge.

[8]. Prosecution Witnesses have suppressed the injuries on the body of the accused persons.

[9]. The witnesses believed by the learned trial Judge perhaps were either accused in the cross-case or were the persons interested in the result of the case. So their evidence was required to be scrutinized with uttermost care and caution.

[10].The material contradictions and improvements made by

prosecution witnesses have not been considered in its proper perspective.

9. For the reasons aforesaid, the order of conviction and sentence recorded by the learned trial Judge cannot sustain in the eye of law. The appeal is, therefore, required to be allowed, and is accordingly allowed. The order of conviction and sentence recorded against the accused-appellants by learned Sessions Judge, Dahod in Sessions Case No. 285 of 2004 [Old Sessions Case No. 9 of 2004] is hereby quashed and set aside. The accused-appellants are ordered to be acquitted from the charges levelled against them. The bail bond of accused No.2, who is on bail, shall stand discharged forthwith. Accused No. 1 is ordered to be set at liberty forthwith provided he is not required in any other case. The amount of fine, if any paid, shall be refunded to the appellants, on proper identification.

[C.K.BUCH, J.]

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